

VIA ELECTRONIC SUBMISSION

December 12, 2007

Jennifer J. Johnson
Secretary
Board of Governors of the Federal
Reserve System
20th St. & Constitution Avenue, NW
Washington, DC 20551

Department of Treasury
Office of Critical Infrastructure Protection
and Compliance Policy
Room 1327
Main Treasury Building
1500 Pennsylvania Avenue, NW
Washington, DC 20220

**RE: FRB Docket No. R-1298
Treasury Docket No. DO-2007-0015
Prohibition on Funding of Unlawful Internet Gambling
72 Federal Register 56680
October 4, 2007**

To the Board of Governors and the Department of the Treasury:

On behalf of CheckFree Corporation (“CheckFree”), a wholly-owned subsidiary of Fiserv, Inc., I am writing to express our concerns with the monitoring requirements identified in the proposed Prohibition on Funding of Unlawful Internet Gambling¹ (“Proposed Regulation”) issued by the Federal Reserve and the Department of Treasury (collectively, the “Agencies”).

CheckFree enables financial services providers to offer to their customers the convenience of online banking, bill receipt and bill payment. More than 3,000 financial services Web sites use the electronic billing and payment services provided by CheckFree. CheckFree also offers bill receipt and bill payment to individuals through certain other Internet portals. It also operates walk-in bill payment where individuals may physically go to a storefront and deliver funds to an agent for the purpose of paying bills. In addition, CheckFree develops, markets and supports software applications that are used by financial institutions to process more than two-thirds of the nearly 14 billion Automated Clearing House transactions in the United States. This division of CheckFree also provides financial institutions and other organizations with payment processing and consulting, reconciliation and exception management, fraud and risk management, cash and logistics management, and compliance software and services.

¹ Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56690 (Oct. 4, 2007) (to be codified at 12 C.F.R. § 233 and 31 C.F.R. § 132).

In light of the extensive scope of CheckFree's contacts with financial institutions, billers, merchants, and consumers who use one or more of CheckFree's services, and which touch on several of the designated payment systems covered in the Proposed Regulation, we are concerned about the scope of §132.6 of the Proposed Regulation, which requires designated payment systems to have in place policies and procedures that are reasonably designed to identify and block, or otherwise prohibit, restricted transactions.² Although the Proposed Regulation does not expressly mandate any particular policies or procedures, it does provide a list of "nonexclusive" examples of policies and procedures that the Agencies will deem reasonable.³ Thus, if a designated payment system implements these policies and procedures, it will effectively enjoy a safe harbor and be deemed to be in compliance with the Proposed Regulation.

Such a safe harbor would, under most circumstances, be a welcome avenue for an institution suddenly facing new requirements in unfamiliar territory. But the safe harbor is useful only if, in practice, a company such as ours can meet the criteria set forth to qualify for inclusion. Unfortunately, this may not be the case with respect to certain aspects of the policies and procedures outlined by the Agencies. Specifically, the Proposed Regulation contains a requirement that card systems and money transmitters include ongoing monitoring of Web sites to detect the unauthorized use of the payment systems' trademarks.⁴

The Agencies justify this requirement by stating that Internet gambling operators may be able to access a payment system, avoiding that payment system's due diligence efforts, by using an intermediary or agent to receive restricted transactions. This service may be advertised on the Web site, potentially by using the payment system's trademark in an unauthorized manner. The Agencies assert that "certain" money transmitting businesses have monitoring procedures that enable the money transmitter to detect suspicious payment volumes, and that "certain" money transmitters subscribe to a service that searches the Internet for any unauthorized use of the money transmitter's trademark.⁵ It is not at all clear how many institutions are currently utilizing this type of service, nor do the Agencies provide any indication of how much the service costs, as the Agencies do not identify the money transmitter to which they refer, nor do they cite any evidence as to the effectiveness of such actions, how comprehensive the monitoring may be, and how frequent it should be.

² 72 Fed. Reg. 56698. A "Restricted transaction" is generally, any transaction or transmittal, such as credit, funds transfer, check, draft, or other payment instrument, involving the proceeds of unlawful Internet gambling. 72 Fed. Reg. 56697.

³ 72 Fed. Reg. 56698.

⁴ The Proposed Regulation would require money transmitters to have "[o]ngoing monitoring or testing to detect potential restricted transactions, such as ... (ii) monitoring web sites to detect unauthorized use of the relevant money transmitting business, including their trademarks..." 72 Fed. Reg. 56699. Similar language applies to card systems as well. 72 Fed. Reg. 56698.

⁵ 72 Fed. Reg. 56689.

We are extremely concerned about this proposed requirement, as we find it to be overly vague, potentially costly, and burdensome. The Proposed Regulation does not provide any guidance as to what level of monitoring would be required for the payment system to be deemed in compliance and thus within the safe harbor. Although the Agencies state that “certain” money transmitters have contracted with vendors to “search the Internet,” the Proposed Regulation does not state how often a payment system or company covered under the rules of a payment system must monitor the Internet for unauthorized trademark use. It is not possible to determine whether a payment system or a company covered under the Proposed Regulation must investigate every instance where the payment system’s logo or trademark appears, monitor on a 24-hour per day, 7-day per week basis, or monitor on a non-continuous but ongoing basis that is periodic in nature. If the latter is sufficient, the Proposed Regulation fails to specify the frequency of such monitoring that it would require.

Any requirement for ongoing or comprehensive monitoring could prove to be costly and time consuming. For example, a quick Internet search for “PayPal” results in 32,600,000 separate “hits” of different URLs or Web pages. As drafted, the Proposed Regulation requires that the monitoring be “ongoing” but does not define the term. CheckFree and other companies that could be subject to the monitoring requirement will need guidance as to whether the monitoring of Web sites must be constant, hourly, daily, weekly, or to take place at some longer interval.

The Proposed Regulation also does not provide any guidance on what actions the payment system is to take if it determines that there is unauthorized use of its trademark. Trademarks are valuable assets that businesses typically take action to protect. But the Agencies leave open the question of whether any *specific* action is required by the payment system so that the payment system will qualify for the safe harbor. The Proposed Regulation does not provide guidance regarding the steps or actions that the payment system would be required to take once it becomes aware of such unauthorized use to ensure that it does not face civil liability for failing to have reasonable policies and procedures in place. Notably, most of the Internet gambling sites and agent sites will likely be in foreign jurisdictions. In such situations, a company ordinarily will make cost-benefit calculations about the degree of injury to its trademark against the cost of enforcing its intellectual property rights, assuming the right to enforce in any given foreign jurisdiction even exists. By contrast, the Proposed Regulation does not provide guidance as to whether a company must take affirmative actions to stop the unauthorized use of its trademark as a condition of compliance with the Proposed Regulation, regardless of the economic harm to its legitimate business with third parties who may be tangentially, and unwittingly, involved with facilitation of a restricted transaction.

We believe it is critical for the Agencies to examine this issue more fully before any final regulation is issued, and suggest that the Agencies provide additional guidance regarding the specific questions presented above.

Sincerely,

CHECKFREE CORPORATION

/s/

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